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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of Commercial Energy of Montana Inc.
d/b/a Commercial Energy of California for Rehearing of
Resolution E-5138.

Application _____

**APPLICATION BY COMMERCIAL ENERGY OF MONTANA INC.
D/B/A COMMERCIAL ENERGY OF CALIFORNIA FOR
REHEARING OF RESOLUTION E-5138**

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Dated: May 17, 2021

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Pursuant to Rule 16.1 of the Commission’s Rules of Practice and Procedure and Rule 8.1 of General Order 96-B, Commercial Energy of Montana Inc. d/b/a Commercial Energy of California (“Commercial Energy”) applies for rehearing of Resolution E-5138 (the “Resolution”), which rejects Commercial Energy’s appeal of the Energy Division’s denial of Commercial Energy’s request for a waiver of local Resource Adequacy (“RA”) procurement requirements for years 2021 and 2022.

FACTUAL AND PROCEDURAL BACKGROUND

Commercial Energy operates as an energy service provider (“ESP”) offering commercial customers and government agencies competitive choices for the acquisition of electric power. As such, Commercial Energy is a load serving entity (“LSE”) and, therefore, is required to comply with various power procurement obligations established by the Commission, including demonstrating through year-ahead and month-ahead RA filings that it has acquired sufficient capacity to serve its projected loads. In the event an LSE is unable to make the required showing, it may be subjected to costly penalties.

At the time of Commercial Energy’s 2021-2022 year-ahead RA filing, which was submitted on October 30, 2020, Commercial Energy had procured sufficient capacity to meet its “system” and “flex” RA requirements but was facing local capacity shortfalls in certain local areas despite having made, in its view, all reasonable and good faith efforts to procure additional commercially reasonable capacity to overcome those shortfalls. Therefore, in accordance with procedures established in D.06-06-064 and D.19-06-026, Commercial Energy sought a waiver of the local RA procurement requirements for these areas.¹

Section 3.3.12 of D.06-06-064 specifies that an advice letter seeking a waiver of local RA requirements must include the following:

- (1) a demonstration that the LSE reasonably and in good faith solicited bids for its RAR capacity needs along with accompanying information about the terms and conditions of the Request for Offer or other form of solicitation, and
- (2) a demonstration that despite having actively pursued all commercially reasonable efforts to acquire the resources needed to meet the LSE’s local procurement obligation, it either
 - (a) received no bids, or
 - (b) received no bids for an unbundled RA capacity contract of under \$[51] per kW-year or for a bundled capacity and energy product of under \$73 per kW-year, or
 - (c) received bids below these thresholds but such bids included what the LSE believes are unreasonable terms and/or conditions, in which case the waiver request must demonstrate why such terms and/or conditions are unreasonable.^[2]

¹ The local areas for which Commercial Energy sought waivers include: for 2021, San Diego, Bay Area, Sierra, Stockton, North Coast/North Bay (NCNB), and Fresno; and for 2022, Sierra, Stockton, NCNB, and Fresno.

² The local RA waiver trigger price was increased from \$40/kW-year to \$51 kW-year by D.19-06-026.

As provided by that section, “An LSE’s waiver request that meets these requirements is a necessary but not a sufficient condition for the grant of such waiver. The Commission will also consider other information brought to its attention regarding the reasonableness of the waiver request.”

In accordance with these provisions, Commercial Energy made its waiver request via Advice Letter 10-E, which was submitted on November 2, 2020 (the “Advice Letter”). The Advice Letter included details regarding the shortfalls and Commercial Energy’s efforts to procure local resources. In addition, Commercial Energy provided further details and documentation of its procurement efforts in response to the Energy Division’s November 30, 2020 “Data Request for Commercial Energy’s 2021 Year Ahead Local Waiver Request AL 10-E” (the “DR Response”).

Commercial Energy believed its actions fulfilled the requirements defined above both in action and spirit, as detailed below. Indeed, the documentation furnished by Commercial Energy, which comprises the “record” in this matter, demonstrates that Commercial Energy undertook exhaustive efforts to meet its local RA requirements.

However, the Energy Division denied the waiver request by letter dated December 30, 2020, and following Commercial Energy’s appeal, the Resolution upheld the denial, stating:

The Commission finds that Commercial Energy has not demonstrated that it has made a reasonable and good faith effort to procure Other PG&E local capacity as well as capacity in two other local areas. Commercial Energy mainly attempted to procure through brokers. Commercial Energy issued one RFO. However, Commercial Energy did not seek reasonable existing Resource Adequacy products to meet its 2021 local RA requirement. Furthermore, Commercial Energy did

not submit bids into several solicitations distributed by other market participants, including all the utility issued RFOs.³

The Resolution ignores important facts established by the documentation presented by Commercial Energy and misstates other relevant information. The assertion that Commercial Energy mainly attempted to procure through brokers is without a factual basis and unfairly impugns Commercial Energy's reasonable and good faith efforts to meet its obligations.

In particular, the Resolution inexplicably minimalizes the extent of Commercial Energy's RFO coordinated by Fractal Consultants ("Fractal").⁴ Fractal has been relied upon by a number of CCAs and IOUs in California to conduct similar solicitations. The RFO issued by Fractal on in March 2020 was a formal, wide-ranging and ongoing solicitation for local RA, RPS, solar, and storage resources. Fractal helped Commercial Energy develop and encourage offers from various generators and developers active in the California market and the RFO went out to over 80 firms. Commercial Energy asked bidders for either 3-year or 10-year local RA (as well as RPS), and Commercial Energy offered to either buy capacity through a power purchase agreement ("PPA") or purchase the generating assets outright.

Importantly, the RFO was continuing and not a "one-time" local RA solicitation as suggested by the Resolution. Rather, the RFO was designed to provide an opportunity for Commercial Energy to dramatically expand its wholesale contacts and contracts to better meet its forward obligations and encouraged creative solutions integrating long term RPS with local RA to meet peak demands. The RFO was very clear about the extensive scope of the solicitation, stating.

- All products are for RA compliance years beginning as soon as July 2021.

³ Resolution, p. 5.

⁴ See DR Response, Item 2 and referenced exhibits.

- Preference for commercial operation date (“COD”) of July 2021, however other offers will be accepted.
- All RA products sought by this RFP are associated with Local RA capacity.
- Both the Local and System RA attributes will become part of and included in any transaction resulting from this RFP which involves MWs from such resources.
- RA capacity submitted into this RFP must be from generating units located within the California Independent System Operator (“CAISO”) Balancing Authority Area.
- RA capacity must be eligible for inclusion in both Year-Ahead and Month-Ahead compliance filings with the California Public Utilities Commission (“CPUC”) and CAISO.
- All products for RA must be firm, fixed quantities with the only excuse for non-delivery being force majeure. Please note that in accordance with the CAISO Tariff, sellers will be fully responsible for providing replacement in the event of outages and CE expects this requirement to be met by Respondents.
- Product capacities may be proposed in any whole MW increment.
- Hybrid or joint assets need not be on the same site(s)

Commercial Energy does not have insight as to why the Energy Division and the Resolution misunderstood the nature and scope of Commercial Energy’s solicitation. Perhaps, there may have been confusion due to differences in the processes followed by Commercial Energy by comparison to those used by quasi-governmental entities, such as CCAs. However, Commercial Energy’s procurement effort was robust and should not have been given such short shrift. The fact is that the Fractal RFO was kept open and refreshed multiple times over a six-month period while Commercial Energy actively sought to bring this intensive effort to fruition. As Commercial Energy explained:

During the months of May and June, Fractal and CE held follow-up calls and sent emails clarifying proposals and modifying solutions as needed or requested. Our executive team (CEO, CFO, CRO, and

President) held scheduled *weekly* meetings with the Fractal team to review updated pricing and commissioning dates. During that time, Fractal was able to generate *six other* companies with interest in serving CE's energy and RA needs.⁵

Over the six-month period from the release of the RFO in March 2020 offers from various parties were received, updated, modified, and re-priced multiple times as Commercial Energy met weekly with Fractal to review the bids, references, and complete its due diligence, all leading to the execution of contracts in October 2020.

Further, while Commercial Energy's executive team was handling the Fractal process, its trading desk made repeated direct solicitations to known, credible potential generators, aggregators, and on-system brokers, as documented both in exhibits to the Advice Letter and the DR Response.

Combined, these efforts enabled Commercial Energy to procure, by paying above-penalty rates, sufficient resources to meet its system and flexible RA obligations.⁶ In addition, Commercial Energy was able to enter into long term RPS contracts that more than fulfilled its RPS obligations for the next decade.⁷ But, even though Commercial Energy bid above-penalty prices for local RA capacity, no additional reliable local RA capacity was made available to it.⁸

⁵ DR Response, item 2 (emphasis added).

⁶ See Advice Letter, p. 2.

⁷ As noted, Commercial Energy was actively attempting to fulfill all of its compliance obligations, not just short-term solutions.

⁸ Commercial Energy notes that it did receive some proposals from demand response ("DR") aggregators who were developing their markets, but Commercial Energy rejected them because they lacked credibility. Specifically, their DR capabilities were unproven and the proposed contracts did not include financial penalties if the aggregator failed to deliver the promised capacity. In Commercial Energy's view, it would have been imprudent to rely on this non-firm resource to meet its obligations and represent in its year-ahead filing to the Commission that Commercial Energy had met its obligations.

Thus, despite six months of weekly meetings and constant emails and calls Commercial Energy was unable to procure local RA, either through the RFO or its other efforts, that would enable it to meet its obligations in 2021. Two potential sellers suggested that new generation might become available with mid-Summer 2022 start dates, but they required a minimum ten-year commitment and could not guarantee that they would be in commercial operation for any portion of the Summer 2022 period due to uncertainty stemming from the COVID pandemic. As this Commission is well aware, the COVID pandemic affected the entire generation deployment chain, from equipment and product purchases, to local permitting and contracting, to IOU interconnection queues and more. Consequently, Commercial Energy determined that it would have been commercially unreasonable and imprudent to enter into long-term contracts for these resources, which appeared speculative for Summer 2022 commissioning and, even then, would not have actually met Commercial Energy's needs for the 2021 RA compliance period.

Despite this strong, uncontroverted evidence of Commercial Energy's exhaustive, reasonable and good faith procurement efforts, by letter dated December 30, 2020 the Energy Division denied Commercial Energy's request for a waiver. Commercial Energy thereafter appealed the denial pursuant to Section 7.6.3 of General Order 96-B, and, as noted, on April 15, 2021 the appeal was rejected by the Resolution, which concluded that "Commercial Energy did not reasonably and in good faith solicit RA bids for its RA capacity needs."⁹

According to the Resolution, Commercial Energy failed to pursue "all available opportunities to procure, including issuing RFOs and bidding into other entities' RFOs."¹⁰

⁹ Resolution at 5.

¹⁰ *Id.*

Specifically, the Resolution asserts, “Commercial Energy did not seek reasonable existing Resource Adequacy products to meet its 2021 local RA requirement. Furthermore, Commercial Energy did not submit bids into several solicitations distributed by other market participants, including all the utility issued RFOs.”¹¹

However, these assertions are not supported by citation to any data, documentation, reports, records, or even anecdotal references. Indeed, there is nothing in the Resolution that identifies any resources or bidding opportunities that Commercial Energy missed or describes any actual RA products that Commercial Energy overlooked. While the Resolution asserts that Commercial energy failed to bid into “utility issued RFOs,” to Commercial Energy’s knowledge there was **no** PG&E solicitation offering **any** local RA at any time in 2020 to LSEs through **any** open bid solicitations. PG&E did issue an RFO in 2019 and Commercial Energy, in fact, successfully purchased local RA from PGE through that RFO), but that process was completed in December 2019 and the RFO did not remain open past then. These facts directly contradict the Resolution’s claim and there is no evidence of any other “missed” opportunities.

The most the Resolution offers is a simplistic observation that “not all small LSEs have difficulty procuring capacity to meet their local RA requirements.”¹² Yet, at the same time, the Resolution recognizes that “twenty (20) LSEs, out of a total of forty-two (42) Commission-jurisdictional LSEs, submitted local waiver requests due to their inability to procure sufficient capacity in one or more local areas to meet their 2021 year ahead local RA requirements.”¹³

Twenty out of forty-two LSEs sought waivers, almost half of the total LSEs in California, yet the Resolution singles out Commercial Energy out as a scapegoat for the potential

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 4.

threat of local RA shortfalls. Clearly, the Resolution’s suggestion that if Commercial Energy (and the other LSEs that were unable to procure sufficient local RA) had just “tried harder” they could have met all of their needs, is naïve and out of touch with the realities of the current RA marketplace.

The reality is that the investor-owned utilities (“IOUs”), in this case PG&E, have over-whelming power in the local RA marketplace, and their refusals to make such capacity available prevents other parties from meeting their local RA needs. Moreover, this market power situation has been exacerbated by recent actions taken by the Commission itself. Under the Commission’s Central Procurement Entity (“CPE”) program, generators are discouraged from contracting to sell small volumes of power to LSEs, given that this CPE program provides them with the opportunity, instead, to enter into long-term contracts to sell their power to IOUs.¹⁴ Similarly, the Commission’s recent directive requiring IOUs to acquire 3000 MW of additional resources also dramatically distorts the marketplace for local RA capacity. Under the Commission’s directive, IOUs will be required to procure substantial, long-term RA resources at virtually any price, which places small LSEs, such as Commercial Energy, who are seeking to procure small increments of local RA, in multiple local RA areas, in positions where the capacity they need is not available at commercially-reasonable prices or, possibly, at any price at all.

Although these disruptive, anti-competitive factors were addressed by Commercial Energy in its appeal of the Energy Division’s waiver denial, and the very purpose of the adopted waiver process is to mitigate against the exercise of market power,¹⁵ the Resolution

¹⁴ See DR Response, Item 2.

¹⁵ See D.06-06-064 at 71. Also note that the Commission reiterated this purpose of the local RA waiver process more recently in D.19-06-026, while declining to extend the same process to system or flexible RA.

is utterly silent regarding these Commission-made constraints and the impacts of clearly-evident market power on the availability of local RA and the resulting prejudice to smaller LSE's, such as Commercial Energy.

The foregoing, uncontroverted facts demonstrate that Commercial Energy should have been granted the requested local RA waiver. By contrast, the Resolution's rejection of Commercial Energy's appeal, as well as the original denial of its waiver request by the Energy Division, are completely unfounded. The Resolution's denial of the waiver is based on pure, unsupported speculation with respect to the availability of resources that Commercial Energy supposedly failed to pursue. Contrary to the representations in the Resolution, Commercial Energy held open a robust, ongoing RFO during a pandemic that successfully encouraged and elicited bids over a six-month period. Second, there is no evidence that the only utility holder of the local RA in northern California, PG&E, ever offered to sell any Local RA capacity at any price during 2020. Further, the Resolution completely ignores the established market power of the IOUs in the local RA marketplace, as well as additional market distortions, some caused by the Commission's recent procurement mandates, that operated to preclude Commercial Energy from being able to procure sufficient capacity to meet its year-ahead local RA procurement obligations on reasonable terms, despite its good faith, commercially-reasonable efforts to do so.

As such, the Resolution falls short of the requirements of law. Specifically, the findings upon which the Resolution relies in denying the waiver sought by Commercial are not supported by evidence, much less substantial evidence viewed in light of the whole record. (*See* Pub. Util. Code § 1757(a)(4).) Accordingly, the Resolution's denial of the waiver was error and must be reversed.

SPECIFICATION OF ERROR

1. THE RESOLUTION’S DENIAL OF COMMERCIAL ENERGY’S LOCAL RA WAIVER REQUEST IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

As noted, the Resolution’s conclusion that “Commercial Energy did not reasonably and in good faith solicit RA bids for its RAR capacity needs” is based on assertions that “Commercial Energy did not seek reasonable existing Resource Adequacy products to meet its 2021 local RA requirement” and that “Commercial Energy did not submit bids into several solicitations distributed by other market participants, including all the utility issued RFOs.”

This seemingly logical rationale for denying Commercial Energy’s waiver request is not, however, enough. To survive judicial review, the factual underpinnings of Commission decisions must be supported by substantial evidence. (Pub. Util. Code § 1757(a)(4).)

“Substantial evidence’ is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Cites.]” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) “Substantial evidence, of course, is not synonymous with ‘any’ evidence, but is evidence which is of ponderable legal significance. It must be ‘reasonable in nature, credible, and of solid value; it must actually be “substantial” proof of the essentials which the law requires in a particular case.’” (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal. App. 3d 864, 871, citing *Estate of Teed* (1952) 112 Cal. App. 2d 638, 644; *Kruse v. Bank of America* (1988) 202 Cal. App. 3d 38, 51.)

Here, all that the Resolution proffers from an evidentiary standpoint is the observation that “not all small LSEs have difficulty procuring capacity to meet their local RA requirements.”¹⁶ This blithe assertion falls well short of proof that Commercial Energy failed to

¹⁶ Resolution at 5.

faithfully pursue reasonable efforts to overcome its local RA shortfall. There is substantial evidence that many small LSEs had difficulty procuring Local RA capacity. Almost half of all LSEs sought a waiver of their Local RA compliance obligations. Moreover, the record is bereft of any specifics as to the prices the LSEs who were able to meet their 2021-2022 local RA obligations paid for the capacity they procured; or which local areas they serve, what their loads are in those markets or whether their loads are declining or growing. Nor is there is evidence of the reliability of the contracted-for resources. More importantly, there is no evidence whatsoever of the availability of excess local RA in any areas needed by Commercial Energy or the twenty other LSEs sought waivers. The fact that PG&E did not hold any solicitations for Local RA for the compliance period at issue is a clear indication of an exercise of market power. In short, the fact that some LSEs may have enjoyed success in procuring local RA is not evidence that Commercial Energy did not seek existing local RA products or bid into marketplace solicitations, or use all reasonable efforts available to it to procure local RA. Such an anecdotal observation is simply not reasonable, credible evidence to establish the facts for which the Resolution offers it as “proof.”

Moreover, even if one could read more into the Resolution’s “evidence,” it would still not be sufficient. Under the standard established by section 1757, the determination of substantiality requires examination of evidence in “light of the whole record.”

The “in light of the whole record” language means that the court reviewing the agency’s decision cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 149.) Rather, the court must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence. (Citation omitted.)

(*Lucas Valley Homeowners Ass’n v. County of Marin, et al.* (1991) 233 Cal.App.3d 130, 141–142.)

The record in this case includes the fact that nearly half of LSEs were unable to procure sufficient capacity to meet their needs. It also includes evidence showing that Commercial Energy bid into multiple solicitations and was not met with offers to sell, but, instead, only offers to buy, capacity. The record also shows that Commercial Energy made repeated, on-going efforts for over a year to procure local RA, via a broad market solicitation and direct internal contacts and through brokers, but was unable to fully meet its local RA needs despite offering above-penalty rates. In light of this well-documented evidence submitted with Commercial Energy's Advice Letter and DR Response, the evidence relied upon by the Resolution in denying the requested waiver does not come close to what might be deemed "substantial."

Indeed, the evidence is over-whelming that the local RA market was suffering from inadequate supply, significant market power distortions, and the unassailable fact that there was simply not enough local RA available for all LSEs to meet the Commission's requirements. On top of this, the Commission's adoption of the CPE Program in mid-2020 discouraged potential suppliers from participating in short term sales of small amounts of incremental local RA capacity, lest they tie up resources that could be bid into long term contracts that would be required by the CPEs.

Altogether, the substantial evidence of record establishes that Commercial Energy sought to fulfill its obligations in a reasonable manner and as best as it could. In fact, it left no stone unturned in that regard, and very clearly should have been granted a waiver. The Resolution's failure to reverse the Energy Division's denial of that waiver is without a factual basis or sufficient justification; it is completely at odds with the only substantial evidence that exists in the record, and it is therefore unlawful.

CONCLUSION

For the reasons shown above, the Resolution's confirmation of the Energy Division's denial of the local RA waiver requested by Commercial Energy must be reconsidered and reversed. The rationale given by the Resolution for denying Commercial Energy's appeal is not supported by substantial evidence or logic. Indeed, under the well-known, distorted circumstances of the local RA market, denying the waiver and potentially exposing Commercial Energy to substantial fines is plainly wrong and an abuse of discretion.

Respectfully submitted May 17, 2021 at San Francisco, California.

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